TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 885.

WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, PLAINTIFFS IN ERROR,

vs.

THE EUREKA PIPE LINE COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED MARCH 2, 1923.

(29,435)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 5, 1923.

1 Pleas Before the Supreme Court of Appeals of the State of West Virginia.

At a Regular Term of the Supreme Court of Appeals, held at Charleston, Kanawha County, from the 11th day of January, 1922, to the 3rd day of June, 1922, both inclusive, the following order was made and entered during said term on the 30th day of May, 1922, to-wit:

Absent: Judge Lively.

ORDER FILING MANDATE.

(Filed May 30, 1922.)

4196.

EUREKA PIPE LINE COMPANY, Plaintiff Below, Appellee.

vs.

WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County Pronounced on the 8th Day of September, 1920.

The mandate of the Supreme Court of the United States in the case lately pending therein, entitled The Eureka Pipe Line Company vs. Walter S. Hallanan, State Tax Commissioner, et al., having been presented to the Court on the 6th day of February, 1922, it is now ordered that the same be recorded in the Order Book of this Court.

The said mandate is in words and figures as follows:

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Whereas, lately in the Supreme Court of Appeals of the State of West Virginia, before you, or some of you, in a cause between Walter S. Hallanan, State Tax Commissioner et al., appellants, and the Eureka Pipe Line Company, appellee, No. 4196, where in the judgment of the said Supreme Court of Appeals, entered in said cause on the 26th day of November, A. D., 1920, is in the following words, viz:

2 "The Court, having maturely considered the motion to reverse the decree aforesaid, the record thereof and the arguments of counsel thereon, is of opinion to, for reasons stated in writing and filed with the record, and hereby doth, sustain said motion as to part of said decree and overrule said motion as to the remainder thereof. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 8th day of September, 1920, in so far, and in so far only, as it decrees and holds the Transportation Act, mentioned and described in the bill and proceedings in this cause, being Chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session of 1919, to be void and perpetually inhibits, enjoins and restrains the appellants from enforcing or attempting to enforce against the appellee, in any manner or respect, the provisions of said act in so far as the same apply to intrastate commerce as defined in the written opinion filed herein, be and the same hereby is set aside, reversed and annulled, and that in all other respects said decree be and the same hereby is affirmed, and that the appellee do pay to the appellants their costs about the prosecution of their appeal in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County."

as by the inspection of the transcript of the record of the said Supreme Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears,

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that the said appellee, The Eureka Pipe Line Company,
3 recover against the said appellants Three Thousand Two hundred and twenty-three dollars and eighty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court of Appeals for further proceedings not inconsistent with the opinion of this Court. December 12, 1921.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of Appeals of the State of West Virginia, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the fourth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

Costs of Appellee.

Clerk	$687.85
Printing Record	2,516.00
Attorney	20.00
	$3,223.85

And the Court takes time to consider of the final order to be entered in this cause.

At another day, towit, on the 2nd day of June, 1922, and during the regular term of said Court as aforesaid, the following order was made and entered in this cause:

Absent: Judge Lively.

[Title omitted.]

FINAL ORDER ON MANDATE.

(Filed June 2, 1922.)

Upon an appeal from a decree of the Circuit Court of Kanawha County pronounced on the 8th day of September, 1920.

The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered
4 and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 8th day of September, 1920, be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County.

5 PETITION FOR WRIT OF ERROR.

Supreme Court of the United States.

THE EUREKA PIPE LINE COMPANY, Plaintiff Below, Defendant in Error,

vs.

WALTER S. HALLANAN, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, Defendants Below, Plaintiffs in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Appeals of the State of West Virginia.

To the Honorable William H. Taft, Chief Justice, and the Associate Justice of the Supreme Court of the United States:

Now comes the above named Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, plaintiffs in error, as aforesaid, and represent that at the October Term, 1921, of the Supreme Court of the United States, the case of The Eureka Pipe Line Company, Plaintiff in Error, vs. Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, was argued and determined, and thereupon the following mandate was issued and transmitted to the Supreme Court of Appeals of the State of West Virginia, to-wit:

"UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

6 Whereas, Lately in the Supreme Court of Appeals of the State of West Virginia, before you, or some of you, in a cause between Walter S. Hallanan, State Tax Commissioner et al., appellants, and the Eureka Pipe Line Company, appellee, No. 4196, wherein the judgment of the said Supreme Court of Appeals, entered in said cause on the 26th day of November, A. D. 1920, is in the following words, viz:

The Court, having maturely considered the motion to reverse the decree aforesaid, the record whereof and the arguments of counsel thereon, is of opinion to, and for reasons stated in writing and filed with the record, and hereby doth, sustain said motion as to part of said decree and overrule said motion as to the remainder thereof. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 8th day of September, 1920, in so far, and in so far only, as it decrees

and holds the Transportation Act, mentioned and described in the bill and proceedings in this cause, being Chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session of 1919, to be void and perpetually inhibits, enjoins and restrains the appellants from enforcing or attempting to enforce against the appellee, in any manner or respect, the provisions of said act in so far as the same apply to intrastate commerce as defined by the written opinion filed herein, be and the same hereby is set aside, reversed and annulled, and that in all other respects said decree be and the same hereby is affirmed, and that the appellee do pay to the appellants their costs about the prosecution of their appeal in this court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County."

as by the inspection of the transcript of the record of the said Supreme Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court of Appeals in this cause, be, and the same is hereby, reversed with costs; and that the said appellee, The Eureka Pipe Line Company, recover against the said appellants Three Thousand two hundred and twenty-three dollars and eighty-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court of Appeals for further
7 proceedings not inconsistent with the opinion of this Court. December 12, 1921.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of Appeals of the State of West Virginia, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding."

Witness the Honorable William H. Taft, Chief Justice of the United States, the fourth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States."

Cost of Appellee:

Clerk	$687.85
Printing Record	2,516.00
Attorney	20.00
	$3,223.85

Your petitioners further represent that they made application, by their attorneys, to the said Supreme Court of Appeals of West Virginia to execute the mandate aforesaid in conformity with the judgment and decree, and the opinion, of this Honorable Court. Your petitioners further represent that said Supreme Court of Appeals refused and failed to execute said mandate in conformity with the judgment and decree, and the opinion, of this Honorable Court, but at its January Term, 1922, to-wit, on the 2d day of June, 1922, and at a term thereof long subsequent to the end of the term at which its said final order and mandate of November 26, 1920, was entered, said Supreme Court of Appeals made and entered the following final order and decree in said cause, to-wit:

"EUREKA PIPE LINE COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

Upon and Appeal from a Decree of the Circuit Court of Kanawha County Pronounced on the 8th day of September, 1920.

The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion
8 that there is no error in said decree. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 8th day of September, 1920, be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County."

Your petitioners are advised, and therefore further present that by making and entering the order aforesaid, the said Supreme Court of Appeals failed to give due effect to, and to carry into execution, the mandate of this Honorable Court, which is the law of the case, in conformity to the opinion and judgment of this Honorable Court, and therefore denied the validity of an authority exercised under the United States contrary to the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6th, 1916.

Your petitioners further represent that it was decided by the said Supreme Court of Appeals, when said cause was originally before it, that the statute, Chapter 5 of the Acts of the Legislature of West Virginia, Extraordinary Session, 1919, imposing a tax upon the business of engaging in the transportation of oil and gas by pipe lines, in question, is valid, and that the tax, two cents per barrels, could be levied on all of the oil of the Pennsylvania Grade, 6,510,081.51 barrels, produced in West Virginia during the year ended June 30th, 1919. It was conceded by counsel for The Eureka Pipe Line Company, both in their briefs filed with, and in their oral argument before, this Honorable Court, that 1,239,099.55 barrels of oil used in

West Virginia during said year were transported in intrastate commerce, and it was held by this Honorable Court that the tax
9 may be levied in respect of said 1,239,099.55 barrels of oil.

In this connection, it was said in the opinion of this Honorable Court that

"But all the oil of the same grade was mixed, regardless of source, and of the Pennsylvania Grade only 1,239,099.55 barrels were used in West Virginia. It is admitted that the tax may be levied in respect of the last item, but the question before us is whether the tax can be laid upon the whole product of the state upon which was imposed the gathering charge."

The said final order of said Supreme Court of Appeals in effect denies to the State of West Virginia the right to levy and collect the tax on said 1,239,099.55 barrels at the rate of two cents per barrel, which amounts to and involves $24,781.99, which is the amount in dispute for said period, and restrains your petitioners, as the agents and representatives of the State of West Virginia, from levying and collecting said tax for said period.

Your petitioners further represent that all of said questions were before your Honorable Court in said cause, and were disposed of by its judgment, decree and opinion, and said Supreme Court of Appeals had no right to vary said judgment and decree upon any matter decided on writ of error; or intermeddle with it, further than to settle so much as was remanded, and cannot question matters to which it had not been reversed. The effect of said judgment, decree and opinion of this Honorable Court was to affirm so much of the decree of the said Supreme Court of Appeals as permitted and authorized your petitioners, as the agents and representatives of the State of West Virginia, to levy and collect the tax on said 1,239,-099.55 barrels of oil, or a total sum of $24,781.99.

10 That your petitioners were, and are, aggrieved by said final order and decree of said Supreme Court of Appeals of West Virginia for their errors aforesaid to the prejudice of your petitioners, will more fully appear from the assignment of errors which is filed herewith.

Wherefore, your petitioners pray that a writ of error from the Supreme Court of the United States may issue in this cause to the Supreme Court of Appeals of West Virginia for the correction of the errors so complained of, that a supersedeas may be allowed, and that a transcript of the record, proceedings and papers in this cause, subsequent to said mandate, duly authenticated by the Clerk of said Supreme Court of Appeals of West Virginia, may be sent to the said Supreme Court of the United States, as provided by law; that said final order and judgment of said Supreme Court of Appeals made and entered on the 2d day of June, 1920, may be re-examined and reversed, and that such other or further proceedings may be had in the premises as may be just and proper. Walter S. Hallanan, State Tax Commissioner of the State of West Virginia; E. T. England, Attorney General of the State of West Virginia, by Counsel. E. T. Englund, Attorney General of West Virginia; S. B. Avis, William Gordon Mathews, Fred O. Blue, Counsel.

ORDER ALLOWING WRIT OF ERROR.

Writ of error allowed upon the execution of a bond by the petitioners, in the sum of one thousand dollars. Said bond, when approved, not to operate as a supersedeas.

Dated, August 28, 1922. William R. Day, Associate Justice of the Supreme Court of the United States.

10½ [Endorsement omitted.]

11 Supreme Court of the United States.

[Title Omitted.]

ASSIGNMENT OF ERROR.

And now come the above named petitioners and plaintiffs in error, by their attorneys, whose names are hereunto signed, and in connection with their petition for a writ of error herein, say that in the records and proceedings and in the rendering of the decree of the Supreme Court of Appeals of West Virginia, entered in the above entitled cause, on, to-wit, the 2nd day of June, A. D. 1922, manifest error has intervened, to the prejudice of these petitioners and plaintiffs in error, in this, to-wit:

It was error for the said Supreme Court of Appeals to fail to give due effect to, and to carry into execution, the mandate of this Honorable Court, in conformity to the opinion and judgment of this Honorable Court and thereby deny to these petitioners and plaintiffs in error the validity of an authority exercised under the United States contrary to the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, in this that the final order of said Supreme Court of Appeals, entered at its January Term, 1922, and at a term thereof long subsequent to the end of the term at which its final order and mandate of November 26, 1920, was entered, to-wit, on the 2nd day of June, A. D. 1922, restrained your petitioners and plaintiffs in error, as the agents and representatives of the State of West Virginia, from levying and collecting two cents per
12 barrel on 1,239,099.55 barrels of oil, transported in intrastate commerce, within the State of West Virginia, amounting to and involving $24,781.99 for the period in question; this Honorable Court not having reversed the decree of the Supreme Court of Appeals entered in this cause on the 26th day of November, A. D. 1920, in respect to said 1,239,099.55 barrels of oil transported in intrastate commerce within the State of West Virginia.

Wherefore the said Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, petitioners and plaintiffs in error as aforesaid, pray that the said decree of said Supreme Court of Appeals of West Virginia, entered in the above entitled cause, on, to-wit, the 2nd day of June, A. D. 1922, in so far only as it denied, in effect, to the State of West

Virginia the right to levy and collect, and restrained these petitioners and plaintiffs in error as the agents and representatives of the said State of West Virginia, from levying and collecting two cents per barrel on 1,239,099.55 barrels of oil transported in intrastate commerce, within the State of West Virginia, should be set aside, reversed and annulled, and that such further proceedings in said cause shall be had as to justice shall appertain. E. T. England, Attorney General of West Virginia; S. B. Avis, William Gordon Mathews, Fred O. Blue, Attorneys for Petitioners and Plaintiffs in Error. Charleston, West Virginia.

12½ [Endorsement omitted.]

13 **BOND ON WRIT OF ERROR.**

Know all men by these presents, that we, Walter S. Hallanan, a responsible person, and as principal for Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, and American Surety Company of New York, a corporation under the laws of the State of New York, as surety, are held and firmly bound unto the Eureka Pipe Line Company, a corporation under the laws of the State of West Virginia, in the full and just sum of One thousand ($1,000.00) Dollars, to be paid to the said United Fuel Gas Company, as aforesaid, its certain successors, attorneys, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of August, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a Term of the Supreme Court of Appeals of the State of West Virginia, that being the highest Court of said State, in a suit depending in said court, between The Eureka Pipe Line Company, a corporation, of West Virginia, and Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, a decree was rendered against the said Walter S. Hallanan, State Tax Commissioner of the State of West Virginia and the said E. T. England, Attorney General of the State of West Virginia, and the said Walter S. Hallanan, State Tax Commissioner of the State of West Virginia and E. T. England, Attorney General of the State of West Virginia, having sued out a writ of error from the United States Supreme Court, to the said Supreme Court of Appeals of West Virginia, and having obtained such writ and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said The Eureka Pipe Line Company, as aforesaid, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

14 Now, the condition of the above obligation is such, That if the said Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the

State of West Virginia, shall present said Writ or Error to effect, and answer all damages and costs if they fail, to make their plea good, then the above obligation to be void; else to remain in full force and virtue. Walter S. Hallanan. (Seal.) American Surety Company of New York, by American Surety Company of New York, by Julian C. Byrd, Resident Vice President. (Seal.) Attest: J. Hunter McClintic, Resident Asst. Secretary. Signed and sealed in the presence of Uriel McCoy. E. L. Burdette.

STATE OF WEST VIRGINIA,
County of Kanawha, to wit:

I, Inez L. Duffield, a Notary Public in and for said County and State do certify that Walter S. Hallanan, whose name is signed to the above bond, this day personally appeared before me in my said county and duly acknowledged the same.

Given under my hand and official seal this 28th day of August, 1922. Inez L. Duffield. Notary Public in and for Kanawha County, West Virginia. (Seal.) My commission expires on the 3rd day of May, 1932.

15 **EXTRACT FROM THE RECORD BOOK OF THE EXECUTIVE COMMITTEE OF THE AMERICAN SURETY COMPANY OF NEW YORK.**

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 31st day of May, 1922.

* * * * * * *

"The following resolution was adopted:

"Resolved, That Julian C. Byrd, of Charleston, West Virginia, be and he is hereby constituted and appointed a Resident Vice President of this Company at the town or city aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of a Resident Assistant Secretary of this Company."

STATE OF NEW YORK,
County of New York ss:

I, F. H. Ivers, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further

certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 1st day of June, 1922. F. H. Ivers, Assistant Secretary. [Seal of American Surety Company of New York.]

16 **AUTHORITY OF SIGNERS FOR SURETY.**

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1921, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, November 30, 1920, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for—

Place.	Resident vice presidents.	Resident assistant secretaries.
Charleston, W. Va.	R. P. De Van. G. C. Dick.	George W. McClintic. W. G. Mathews. John E. Campbell. J. Hunter McClintic.

* * * * * * *

"Whereupon it was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to ex-

ecute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK,
County of New York ss:

I, H. E. Ising, Assistant Secretary of the American Surety Company of New York do hereby certify that I have compared the foregoing extracts and transcripts, form the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1921. H. E. Ising, Assistant Secretary. [Seal of American Surety Company of New York.]

Documentary 25¢ Stamp.

17 STATE OF WEST VIRGINIA,
County of Kanawha, To wit:

On this 28th day of August, A. D. 1922, before me personally came Julian C. Byrd, resident Vice-President of the American Surety Company of New York, and J. Hunter McClintic, resident Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the city of Charleston, county of Kanawha, State of West Virginia; that they, the said Julian C. Byrd and J. Hunter McClintic were respectively the resident Vice-President and the resident Assistant Secretary of said American Surety Company of New York, the corporation described in and which executed the foregoing Power of Attorney and bond; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney and bond was such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation; and that they executed said bond for and on behalf of said corporation and signed their names thereto by like order as the resident Vice-President and resident Assistant Secretary, respectively, of the Company.

My commission expires on the 3rd day of May, A. D. 1932. Inez L. Duffield, Notary Public in and for said county of Kanawha. [Seal.] [Seal.]

STATE OF WEST VIRGINIA,
County of Kanawha, ss:

I, R. N. Moulton, Clerk of the County Court of said Kanawha County, which court is a court of record, and has a seal, do hereby certify that Inez L. Duffield, before whom the annexed affi-
18 davits were made, and who has hereto subscribed her name, was at the time of so doing a Notary Public of the State of West Virginia, in and for the said county of Kanawha, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the hand writing of said Notary and verily believe the signature to be her genuine signature.

In testimony whereof, I hereunto set my hand and affix the seal of the County Court of Kanawha County, this 28th day of August, 1922. R. N. Moulton, Clerk of the County Court of Kanawha County, West Virginia. [Seal.]

Approved: Not to operate as a supersedeas.

Dated, August 28, 1922. William R. Day, Associate Justice of the Supreme Court of the United States.

A True Copy:

Attest: Wm. B. Mathews, Clerk Supreme Court of Appeals of West Virginia.

19 **WRIT OF ERROR.**

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America, to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Eureka Pipe Line Company, plaintiff, and Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties,
20 or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said defendants, as by their complaint appears. We

being willing that error, if any hath been, should be duly corre
and full and speedy justice done to the parties aforesaid in
behalf, do command you, if judgment be therein given, that t
under your seal, distinctly and openly, you send the record
proceedings aforesaid, with all things concerning the same, to
Supreme Court of the United States, together with this writ, so
you have the same in the said Supreme Court at Washington, wi
thirty days from the date hereof, that the record and proceedi
aforesaid being inspected, the said Supreme Court may cause fur
to be done therein to correct that error, what of right, and acc
ing to the laws and customs of the United States, should be don

Witness the Honorable William H. Taft, Chief Justice of
United States, the thirtieth day of August, in the year of our L
one thousand nine hundred and twenty-two. Wm. R. Stansbu
Clerk of the Supreme Court of the United States.

Allowed by —— ——, Associate Justice of the Supreme Cour
the United States.

21 **CITATION AND SERVICE.**

In the Supreme Court of Appeals of the State of West Virginia

[Title omitted.]

UNITED STATES OF AMERICA, *ss:*

To the Eureka Pipe Line Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at
Supreme Court of the United States, to be held at the City of Wa
ington in the District of Columbia on the 27th day of Septem
A. D. 1922, pursuant to a writ of error, filed in the Clerk's offic
The Supreme Court of Appeals of the State of West Virginia, t
final judgment of the said Supreme Court of Appeals of the St
of West Virginia, made and entered on the second day of Ju
A. D. 1922, wherein you were plaintiff below and are now defend
in error and Walter S. Hallanan, State Tax Commissioner of
State of West Virginia, and E. T. England, Attorney General
the State of West Virginia, were defendants below and are n
plaintiffs in error, to show cause, if any there be, why the judgm
rendered against the said plaintiffs in error, as in the said writ
error mentioned, should not be corrected and why justice sho
not be done to the parties in that behalf.

Witness, The Honorable William R. Day, Associate Justice of
Supreme Court of the United States, this twenty eighth day
August in the year of our Lord one thousand nine hundred a
twenty-two. William R. Day, Associate Justice of the Supre
Court of the United States.

Service of copy of foregoing admitted September 1st 1922. Fra
L. Crawford, Attorney for Eureka Pipe Line Company.

22 **CLERK'S CERTIFICATE.**

STATE OF WEST VIRGINIA:

In obedience to the commands of the within writ, I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, herewith transmit to the Supreme Court of the United States a true and complete transcript of the record in the cause of Eureka Pipe Line Company against Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, as the same appears upon the records of my said office, together with all things concerning the same, which transcript is comprised of pages numbered from 1 to 22, and that no opinion was filed in connection with the foregoing orders.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 11th day of September, 1922, and in the 60th year of the State. Wm. B. Mathews, Clerk Supreme Court of Appeals. [Seal of the Supreme Court of Appeals, West Virginia.]

Endorsed on cover: File No. 29,435. West Virginia Supreme Court of Appeals. Term No. 885. Walter S. Hallanan, State tax commissioner, and E. T. England, attorney general of the State of West Virginia, plaintiff in error, vs. The Eureka Pipe Line Company. Filed March 2d, 1923. File No. 29,435.

Office Supreme Court, U. S.
FILED
MAR 12 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia, and E. T. ENGLAND, Attorney General of the State of West Virginia,
Plaintiffs in Error and Petitioners,

against

THE EUREKA PIPE LINE COMPANY, a corporation,
Defendant in Error and Respondent.

October Term, 1922.

On Writ of Error No. 885, and Application for Writ of Certiorari, No. 569.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR UPON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM THE DECREE OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ENTERED UPON THE MANDATE OF THIS COURT UPON FORMER WRIT OF ERROR.

EDWARD T. ENGLAND,
Attorney General of West Virginia;
S. B. AVIS,
FRED O. BLUE,
WM. GORDON MATHEWS,
Attorneys for Plaintiffs in Error and Petitioners for certiorari.

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IN THE

Supreme Court of the United States

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia, and E. T. ENGLAND, Attorney General of the State of West Virginia, Plaintiffs in Error and Petitioners, *against* THE EUREKA PIPE LINE COMPANY, a corporation, Defendant in Error and Respondent.	October Term, 1922. On Writ of Error No. 885, and Application for Writ of Certiorari, No. 569.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR UPON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM THE DECREE OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ENTERED UPON THE MANDATE OF THIS COURT UPON FORMER WRIT OF ERROR.

STATEMENT OF THE CASE.

This suit, the companion suit of United Fuel Gas Company against Hallanan, State Tax Commissioner, and others, and a

large number of other suits of corporations engaged in the transportation of oil and gas within the State of West Virginia, were instituted in the Circuit Court of Kanawha County to enjoin enforcement by the State authorities of Chapter 5 of the Acts of the Legislature of West Virginia, Extraordinary Session 1919.

This statute imposed a privilege tax upon persons and corporations engaged in the transportation of oil and gas by means of pipe lines.

The case was submitted to said Circuit Court for final decision upon bill, answer and replication, and upon depositions duly taken and filed, and at the same time the case of United Fuel Gas Company against same defendants was submitted for final decision upon bill and answer, without replication, and upon an agreed stipulation of facts.

The Kanawha Circuit Court rendered a final decree in this case, and also in the United Fuel Gas case, adjudging said statute to be void as against the respective plaintiffs, and perpetually enjoined the defendants from its enforcement. Appeals were prosecuted from such decree to the Supreme Court of Appeals of West Virginia, where the two cases were argued and submitted and heard together, that Court rendering but one opinion in the two cases.

Said Supreme Court of Appeals of West Virginia reversed the decrees of the Circuit Court of Kanawha County, held the Statute in question to be valid, construed said statute and the legislative intent thereof as being to impose a tax upon those engaged in the transportation of oil and gas within said State in intrastate commerce only, measured by the amount of such local commerce, dissolved the injunction of the Circuit Court in so far as the same enjoined enforcement of said act as applied to intrastate commerce as defined by the written opinion of the Court, and in other respects affirmed the said decree, and awarded costs against the plaintiff, The Eureka Pipe Line Com-

pany. This case and the opinion and syllabus of the Supreme Court of Appeals of West Virginia is reported in 87 W. Va. 396.

In this case, and in the United Fuel Gas case, the plaintiffs sued out writs of error to this Court, and the cases were here fully argued, and heard on the same day considered by this Court upon the merits, resulting in a reversal of the Supreme Court of Appeals of West Virginia, with costs, and a mandate directing "that this cause be, and the same is hereby remanded to the said Supreme Court of Appeals for further proceedings not insonsistent with the opinion of this Court."

These cases were decided by this Court on the same day, the opinion of the majority being delivered in each case by Mr. Justice Holmes.

Upon remand to the Supreme Court of Appeals of West Virginia the mandate of this Court was entered of record May 30, 1922, and on June 2, 1922, that Court entered an order which, without showing any motion to have been made or further argument or hearing of any kind, is as follows:

> "The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County."

Believing that the above quoted judgment of the Supreme Court of Appeals of West Virginia wholly failed to carry out the true meaning and intent of the mandate of this Court, and that such final judgment was and is "inconsistent with the

opinion of this Court" and was not and is not "in conformity with the judgment and the decree of this Court," and accordingly that such final order denied the validity of an authority claimed and exercised under the United States, the plaintiffs applied for and obtained from one of the Justices of this Court writs of error in both cases, and also, as a matter of precaution, applied for a writ of certiorari in each case, which applications are pending.

The Eureka Pipe Line Company having given notice of its intention to move to dismiss the writ of error issued herein, or to affirm the decree of the Supreme Court of Appeals of West Virginia of June 2, 1922, and to deny the application for a writ of certiorari heretofore made, this cause now comes on to be heard on such motions and the brief of counsel filed therewith.

CORRECTION OF THE STATEMENT OF THE CASE AS CONTAINED IN BRIEF OF DEFENDANT IN ERROR.

(*a*) It is stated in the brief of counsel for the other side that the decree, review of which is sought, "adjudged in effect that a State statute was invalid in its entirety, for the reason that the Legislature would not have enacted it if invalid as to interstate commerce as defined by this Court." (Brief, page 4). It further appears from such brief of counsel that the Supreme Court of Appeals of West Virginia had held that there was a valid portion of the statute as enacted and that there was an invalid portion of the statute as enacted, but that the State Court held such portions to be severable, and that the valid portion could be maintained and enforced, and that it was the legislative intent that such valid portion should be so maintained and enforced.

This is a curious and palpable misconception of the actual holding by the Supreme Court of Appeals of West Virginia. Instead of holding that the statute was valid in part and void

in part, but capable of being separated, that Court held, in language too clear for us to further clarify, that the Act in question was valid and that it was the legislative intent, as well as the legal effect of the statute, that it should apply, and be restricted in its application, to the local commerce from the plaintiff. Inasmuch as the decision of the State Court is important in this particular, for upon its depends most of the argument of counsel in brief as to the question of severability being a question for State law, and inasmuch as there can be no doubt as to what that Court actually held and decided in this connection, we call the attention of the Court to the clear language of Judge Ritz in the opinion, 87 W. Va., at pages 404 and 405, and to the following language which constitutes Point 8 of the Syllabus:

> "Licenses—Tax on Privilege of Transporting Oil and Gas by Pipe Lines over a Certain Length of System Held Valid:
>
> Chapter five of the Acts of the Legislature, Extraordinary Session 1919, imposing a tax upon the privilege of engaging in the business of transporting oil and gas by pipe lines over ten miles in length, properly construed, does not violate any of the provisions of the Constitution of the United States or the constitution of this State, *and is a valid and binding legislative act.*"

The Court having made it clear that the legislative intent, as shown by the language used, was to restrict the application of the statute to local commerce, and that, as so intended and construed, the statute as a whole was valid, there of course was and is no question of its severability to be considered, and there was no such question when the case was before this Court on the first writ of error.

(*b*) There is an erroneous statement in the brief in this case (p. 12) where it is broadly stated that the Act, as construed by the Supreme Court of Appeals of West Virginia, "was held to apply to all the oil produced in West Virginia."

A similar statement is made in the brief by counsel in the United Fuel Gas case (p. 12) where it is stated that the State Supreme Court held that the Act, as construed by it, "*was held to apply to all the gas produced in West Virginia by the defendant in error and delivered to other companies for transportation by the latter outside the State.*"

Production of oil or gas in West Virginia was not, by the State Court, made a criterion or test of taxability. The Somerset-Cabell oil, partly produced in Cabell County, West Virginia, was expressly held not subject to the tax for, as handled by the Eureka Pipe Line Company, such handling was held to be interstate commerce.

As to the gas the large quantities sold to the Ohio Fuel Supply Company in West Virginia, and by it transported to and used in Ohio, was expressly held *not* subject to the tax.

What the State Court actually held was that the oil and gas produced in West Virginia and not committed or until committed to interstate commerce was subject to the tax. Such principle was in no wise distributed by this Court, although it held that a certain portion of such oil and gas was committed to interstate commerce when it was sold and delivered to other companies for the purpose of transportation and use beyond the State and it was actually so transported and so sold.

The importance of this distinction is obvious, for upon it is based the entire argument of the defendants in error as to severability of the statute being a question for the State Court after the decision of this Court.

GROUNDS RELIED UPON FOR REVERSAL.

The contention of the plaintiffs in error relied upon to sustain the writ of error and to justify the reversal of the Court below are as follows:

First: That it is manifest from the opinion of this Court upon the first writs of error that it considered these cases upon

the merits, and as involving a statute adjudged valid, and that its consideration of the cases upon the merits was simply to determine whether a certain class of business shown by the record as conducted during a particular year came within or without the application of the statute. It therefore follows that no order entered by the Court below on remand and upon the mandate of this Court which adjudges that statute, and every part thereof, to be void, can be other than "inconsistent with the opinion of this Court."

Second: That said judgment of the court below is and to the extent that it is "inconsistent with the opinion of this Court" necessarily fails to give effect to the spirit and legal intention of the judgment and mandate of this Court, and that its action in so doing will be corrected by this Court upon second writ of error.

Third: That the action of the Court below in holding such statute void in its entirety, after it had been passed upon and treated as valid by this Court and applicable to all local commerce carried on by the Eureka Pipe Line Company, was not mere judicial error of the State Court resting upon its construction of State law as to the severability of the statute in question, which could not be reversed by this Court, but was a plain error on the part of said Court in an attempt to execute and carry out the mandate of this Court, and is such an error as this Court can and will correct upon the second writ of error.

ARGUMENT.

Plaintiffs In Error's First Ground For Reversal.

It is manifest from the opinions of this Court that it decided or assumed as a necessary basis for its decision, opinion and reasoning that the West Virginia statute was valid and applicable as a valid statute to all local commerce of the Eureka Pipe Line Company, and persons, firms and corporations engaged in similar business.

That the above statement is correct, and that the actual decision of this Court, or at least the necessary structure upon which the whole of the reasoning rested, was that the statute in question was a valid statute, we believe to be made so clearly apparent as to be indisputable, but, if disputed, to be a matter of absolute demonstration.

We make this statement believing it to be justified by (*a*) the failure of this Court anywhere to say, or intimate, that the statute was void; (*b*) by unmistakable language in the majority opinion stating its validity and the right to collect the tax thereunder to be conceded; (*c*) by the language of the opinion to the effect that the taxability under the statute of a portion of the oil did not change the character of the major transportation; (*d*) the language in the opinion of the dissenting Justices shows that they considered the majority opinion as assuming the validity of the tax; (*e*) because the validity of the tax as to local commerce was expressly conceded in counsel's brief; (*f*) was also conceded at bar in the oral argument; and finally (*g*) because as a matter of established law, under prior decisions of this Court, the validity of the statute and of the tax imposed thereby upon the privilege of doing local commerce is too firmly established to be questioned, was not questioned by Court or counsel.

These in their order:

(*a*) Because in neither opinion of Mr. Justice Holmes is it

said that the statute, or any part thereof, was void or invalid. It is difficult to conceive the possibility of this Court writing two opinions relating solely to the same *void* statute, the sole subject of its inquiry, and yet refraining from the use of the words "void," "invalid," or any word of similar import. It is equally impossible to believe that if the statute was by this Court deemed as void, such vital question would have been left open to conjecture or discussion in further proceedings thereafter necessarily to be taken. Four words, of one syllable each, would certainly have been somewhere used in one or the other of the Court's opinions.

(*b*) Because in the opinion of this Court in the case, at the very outset, the *validity* of the statute was conceded and assumed as the basis for all that followed where, in the opinion, Mr. *Justice* Holmes stated:

> "It is *admitted* that *the tax* may be levied in respect of the last item (i. e., 1,239,099.55 barrels of Pennsylvania grade oil used in West Virginia) but the question before us is whether *the tax* can be laid upon the whole product of the State upon which was imposed the gathering charge."

It is perfectly obvious that "the tax" could not be imposed upon any part of oil or gas transported by the plaintiff companies except under a valid statute, not a void statute, and there was no statute, valid or void, purporting to impose any such tax except Chapter 5, Acts 1919, Extraordinary Session.

Hence, when "it is admitted" that "*the tax*" "may be levied" in respect to part of the oil or gas transported, the *validity* of the statute upon its face ceased to be a question for this Court's consideration, and the Court simply so treated it, conceding its *validity*, and in the remainder of its opinion in this case, and in the whole of its opinion in the United Fuel Gas case, considered only the question as to what part of the oil and gas transported was *subject to the statute*, local commerce

being so subject and interstate commerce being wholly beyond its scope and beyond the legislative intent to reach.

(*c*) Because this Court, in the United Fuel Gas case, assuming the validity of the statute, plainly says:

> "That the necessities of business require a much smaller amount destined to points within the State to be carried undistinguished in the same pipe lines does not offset the character of the major transportation."

This obviously can mean only that the right to levy the tax upon the oil and gas *used in the State* being admitted, yet the fact that such minor portion so used in the State and subject to the tax was carried undistinguished in the same pipe lines until so used did not affect the character of the residue and *major* portion, so carried in the same pipe lines beyond the State, or render such major portion subject to the tax.

(*d*) It is equally apparent from the dissenting opinion of Mr. *Justice* Clarke, with whom concurred Mr. *Justice* Pitney and Mr. *Justice* Brandeis, that the dissenting Justices, and presumably the Court in conference, conceded the *validity* of the statute then before it, and considered only the question as to how much gas and oil was subject to its terms and the tax imposed thereby, i. e., *the application and enforcement of the Act.*

In *Dahnke-Walker Milling Co.* v. *Bondurant,* decided by this Court December 12, 1921, it is said:

> "Our conclusion on the judicial question is that, *as the State court applied and enforced* to the plaintiff's disadvantage a State statute which the plaintiff seasonably insisted *as so applied* was repugnant to the Constitution and void, the case is rightly here on writ of error. Like rulings on like grounds will be found in Eureka Pipe Line Co. v. Hallanan, ... U. S. ....., post, 127, 42 Sup. Ct. Rep. ....., and also United Fuel Oil Co. v. Hallanan, ... U. S. ....., post, 130, 42 Sup. Ct. Rep. ....." (Italics ours.)

Mr. *Justice* Clarke, at the outset of his opinion in this case, says:

> "*There is no controversy* as to the oil from other States or as to the State produced oil that was delivered to refineries in the State, but to the holding of the Court that the State produced oil, which ultimately went out of the State, moved in interstate commerce from the time it left the wells, I can not agree." (Italics ours.)

Assuming the *validity* of the statute from this point in his opinion, Mr. Justice Clarke discusses only the question whether certain oil held by the majority to be moving in interstate commerce, and hence not subject to the statute, was not in fact and law moving in local commerce and hence subject to the statute and tax. He concludes:

> "Believing as I do that this transportation of oil over approximately four thousand miles of 'gathering' lines in the State to the trunk lines was a local shipment, as the parties all declared it to be, I think the State should be permitted to impose a reasonable license or occupation tax upon the company engaged in such extensive state activity, measured by the volume of such traffic, and that the judgment of the Supreme Court of Appeals of West Virginia restraining the statute to this scope should be affirmed."

It is clear upon the face of the dissenting opinion of the three dissenting Judges that such dissent was solely because the majority opinion excluded from the *operation and proper scope* of the statute certain oil held by the majority to have been moving in interstate and not local commerce.

It is obvious that there could have been no dissent, on this ground, had the *statute itself* been deemed or considered as void by either the majority or the dissenting Justices.

(*e*) Because the validity of the statute in question was a deliberate concession of counsel, carefully stated in brief, on the first writ of error.

In the able and elaborate principal brief filed on behalf of the plaintiffs in error in this case, signed by Messrs. James M. Beck and Frank H. Crawford, page 50, Point VIII, the contention of the plaintiff in error was summarized, capitalized and stated, and the judgment of this Court asked, as follows, the italics being ours:

"**Point VIII.**"

> "The decree of the Supreme Court of Appeals, in so far only as it modified the decree of the Circuit Court of Kanawha County, and *except as to Pennsylvania grade oil produced in West Virginia, gathered by plaintiff in error, transported in the stream of oil and divided enroute to refineries within the State,* should be reversed, and in all other respects should be affirmed; and the said decree of said Circuit Court *should be modified by excepting therefrom only the oil so diverted as aforesaid,* and *as so modified* should be affirmed."

(*f*) Because the validity of the statute and the right thereunder to collect the tax imposed upon oil transported and consumed wholly within the State was expressly conceded at the commencement of the oral argument in this Court by the senior counsel for the plaintiff in error in this case, Mr. Crawford, in response to a direct question propounded by Mr. *Justice* Holmes, which the Court may, and counsel will, recall.

(*g*) Because as matter of established law, and regardless of the proper concessions made by counsel, this Court could not have held the statute in question, as construed by the Court below and limited in its application to oil moving in local commerce, both as to application and measure of the tax, to be void as a statute for infringing on interstate commerce. And the fact that the plaintiff in error used the same instrumentalities for carrying on an interstate business, not subject to the statute, in no manner whatever could effect the right of the State of

West Virginia to impose a privilege tax on its right to carry on a local business or affect the *validity* of the statute doing so.

Osborne v. *Florida*, 164 U. S. 650;

Bowman v. *Oil Company*, 256 U. S. 642.

Certainly no such suggestion of error, going to the *validity* of the statute, was urged upon or even suggested to this Court by counsel after the statute was construed as it was by the Court below.

For the foregoing reasons, we think it too plain for argument that under the letter and the plain spirit of the opinions and decisions of this Court upon the first writ of error this Court either decided, or necessarily assumed, as a basis for its decision, the validity of the statute in question. If so, such decision could never be re-opened by the Court below, and could never be re-opened even by this Court after the end of the term. It is the law of the case, certainly as between the parties litigant.

To permit the State Court on remand to re-open and reverse this basic principle, whether actually decided or necessarily assumed by this Court as a basis for its legal decision, would be to permit the State Court, in substance and effect, to hold the reverse of the judgment of this Court. To permit it to decide the statute to be valid between the parties on the first writ of error, and to require this Court upon such writ of error to consider the merits of the case as disclosed and arising under such valid statute, then for the State Court thereafter to change its mind, especially for reasons which were at all times in the record before it, is to trifle with this Court and to render its investigations academic and its decisions moot.

It is idle to say that simply because this Court reversed the decree of the State Court as a whole such reversal permitted, much less required, the State Court to re-open all questions of validity of the statute, which questions were plainly assumed as having been finally decided by this Court, and made the very basis for its whole opinion.

Plaintiffs In Error's Second Ground For Reversal.

The final judgment of the State Supreme Court, now holding the statute to be void in its entirety, is plainly "inconsistent with the opinion of this Court," violates the law of the case, fails to give effect to the spirit and legal intention of the judgment and mandate of this Court, and its action in so doing is proper to be corrected by this Court on second writ of error.

Whatever was necessarily embraced in, or essential to, the decision and opinion of this Court on the former writ of error is conclusively deemed to have been held and decided by this Court. It becomes the law of the case, no longer open in any court. The rights of the plaintiffs in error thereunder are derived, held and exercised under an authority of the United States, and any decision adverse to such rights is a decision against their validity, proper to be corrected on writ of error. The power and duty of this Court to see that the decisions and mandates are properly, and not arbitrarily, construed, and are carried into effect by State Court is an inherent power of the highest and most essential nature. The proper method of such procedure to enforce such power may have been, at one time, not free from doubt, but that such power exists and would be enforced whenever and in whatsoever manner might be deemed most appropriate in a given case has not been an open question since the decision in *Martin* v. *Hunter*, in 1816.

Proper control and execution of the mandates of this Court, when not accorded by inferior courts, has been applied for through the aid of various auxiliary writs, such as certiorari, mandamus, and writ of error, and this Court has never experienced difficulty in compelling the enforcement of such mandates in accordance with their true spirit and legal intent. It has gone so far where deemed expedient as to recall its mandate and final judgment upon a mere petition, accompanied by a transcript, filed by the plaintiff in error in this Court asking "that the court take proceedings to render its judgment ef-

fectual." *Williams* v. *Bruffy*, 102, U. S. 248, 26 L. Edition 135. But it is considered now to be the well settled law and procedure that the proper method to enforce the execution of a mandate of this Court to a State Court is by second writ of error, and not by a mere summary or coercive process; at least where the action of the State Court is based upon a judicial misconception of the effect of the mandate of this Court, and not upon arbitrary disregard thereof.

In re Blake, 175 U. S. 115, 44 L. Edition 94;

Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291;

Crescent City Live Stock etc. Co. v. *Butchers Union*, 120 U. S. 147, 30 L. Edition 614;

Central National Bank v. *Stevens*, 169 U. S. 432, 42 L. Edition 807.

Magwire v. *Tyler*, 17 Wall. 253; 21 L. Edition 576;

Stanley v. *Schwalby*, 162 U. S. 282, 4 L. Edition 970;

Taylor on Jurisdiction and Procedure of U. S. Supreme Court, 457, and following.

Indeed, the principal case relied upon in support of the motion to dismiss in the case at bar, *Schneider Granite Co.* v. *Gast Realty etc. Co.*, 245 U. S. 288, 62 L. Edition 292, strongly supports the propriety of a writ of error in this case.

There the State Court took precisely the corresponding and appropriate action to that which we understand the State Court should have taken here, namely, recognized the statute as valid except in so far and to the extent that the decision of this Court showed it to be invalid, and the Missouri State Court having taken this view, and both parties having prosecuted writs of error to this Court such writs of error were sustained, and the judgment of the State Court was affirmed.

As we have suggested, and will point out under the next heading, the case at bar is unlike the Missouri case and others relied upon by counsel, in that it presents no question of the severabil-

ity of a void portion of a statute from the valid residue, or the determination after such severance as to the validity of the residue of the statute, or whether the Legislature would have enacted such residue only if it had known that a portion of the statute, as actually enacted, was valid.

We have carefully examined the decisions of this Court cited by counsel for the defendant in error bearing upon the propriety of the writ of error, and, with deference and respect, we submit that they are wholly without application. The cases cited of *Reinman* v. *Little Rock*, 237 U. S. 171, 59 L. Edition 900; *Rogers* v. *The S. B. Wheeler*, 20 Wall. 385, 22 L. Edition 385; *Baer Irrigation Company* v. *Garland*, 164 U. S. 1, 41 L. Edition 327, and other cases cited, simply announce a recognized and undisputed rule that where the decision of the lower court was based upon conflicting evidence as to facts, or dependant upon doubtful inferences, especially where two or more courts had already decided such facts again the plaintiff in error, this Court would presume the correctness of such findings. No one questions the correctness of this principle. To illustrate, in the case of *Rogers* v. *The S. B. Wheeler*, relied on, this Court said:

> "Questions of fact only are presented by this appeal. There is no dispute as to the law. Two Courts have already found against the appellants. It has been over and over again ruled by this Court that under such circumstances the burden is on the appellants to show the error."

Again, in the case of *Reinman* v. *Little Rock*, *supra*, Mr. Justice Pitney used this language:

> "Hence in the present case we ought to, and do assume that the Arkansas Supreme Court acted upon the basis of the *facts* set up in the answer of the City, treating them as sufficiently substantial by the effect of the demurrer in admitting them to be true so far as properly pleaded."

That case simply presented a question as to whether facts averred in the answer, to which there was a demurrer, were, under the State practice, taken as true, and this Court held that they were so taken as true, and being true, justified the decree of the State Court.

The case of *Comanche Light & Power Co.* v. *Nix,* 53 Okla. 220, cited. There the State Court upon remand from this Court held that a State statute imposing a gross revenue tax based upon total gross receipts, from interstate as well as local commerce, was void in its entirety. This was in strict accordance with the decision and opinion of this Court in that case, as Mr. *Justice* Holmes in the opinion, which affirmed the State Court enjoining the collection of the tax, and while saying that whether that particular statute was severable was a question ultimately for the State Court, yet he said:

> "But we see no possible construction on which it could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. For, to recur to the statute, it is not simply a tax on all gross receipts within the State, which possibly might be read as intended to reach such receipts as it could, even if less than all (Ratterman v. Western U. Teleg. Co., 127 U. S. 411, 32 L. Ed. 229, 2 Inters. Com. Rep. 59, Sup. Ct. Rep. 1127); it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the State has no right to tax. Neither the Court below nor this Court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

This language had clearly indicated that the basis of this Court's reasoning in that case was upon the theory that the whole statute was void, just as the opinion in the case at bar indicates that this Court deemed and treated the whole statute as valid, as had the West Virginia Court.

Plaintiffs in Error's Third Ground For Reversal.

The action of the State Court upon remand from this Court adjudging the statute in question void was a misconception of and error in executing the mandate of this Court, and was not merely a matter for State decision and involving no Federal question.

In support of this proposition we submit that the record and final order of the State Court on its face shows that it was entered upon exactly and precisely the same record before that Court when its first decision was made, that no new pleadings or evidence of any kind was before that Court, that its action was its own action taken solely upon the mandate of this Court and does not show that there was any re-opening of the case, re-argument, additional briefs or any motion of any kind on behalf of either litigant.

It is also earnestly contended that the failure of the State Supreme Court of Appeals to write an additional opinion or assign any reason for its final action, which was diametrically opposed to its former action and in conflict with the reasons and opinions assigned therefor, conclusively shows that the action of that Court was not and was not intended to be its own independent judicial action, because, if it had been, the Constitution of West Virginia requires that Court to give its reasons for such action in writing, and prepare a syllabus of the points by it decided.

The record shows that the mandate of this Court was recorded May 30, 1922, and that the State Court "takes time to consider of the final order to be entered in this cause." It was not placed upon the docket, no re-argument was ordered, and, of course, no additional evidence or pleading was received or offered.

The record shows that on June 2, 1922, "*the Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this case, and the*

record of the decree aforesaid, is of the opinion that there is no error in said decree. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County pronounced in this cause on the 14th day of September, 1920, be and the same is hereby affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County."

This is the record and the action in the State Court upon remand, and the whole of it. We submit that upon its face it shows that that Court did not, on its own motion or because of its own judgment, change or recede from a single point theretofore decided by it, or a single reason theretofore assigned for its decision, but simply from a mature consideration of the mandate of this Court, and considering that it required such action it "*therefore*" adjudged, ordered and decreed affirmance of the decree of the Circuit Court of Kanawha County, which held the entire statute void.

We submit that no other fair construction of the action of the Court below is deducible from this record. Absolutely nothing was before that Court when this final order was entered except the pleadings and facts which were before it when its first order was entered, with the sole exception of the mandate of this Court, which mandate and record shows that State Court had "maturely considered," and upon consideration of such mandate and "therefore" it affirmed the decree, which it had formerly reversed and had assigned elaborate and carefully considered reasons for such reversal. This was manifestly an attempt of the State Court to simply execute the mandate of this Court, and that it deemed a decree holding the statute void to be necessary to such execution of the mandate.

We respectfully submit that the State Court erred in so doing, that it attached undue importance to the phraseology of

the mandate which reversed its formed decree as a whole, and insufficient importance to the provisions of such mandate and required further proceedings to be in accordance with the spirit and language of the opinion.

We submit that it is a mere quibble to stress the language of the final order that the cause came on upon "the record of the decree aforesaid," for such phraseology is simply the time honored and universal phrase always used by that Court in affirming or reversing action of inferior courts, and it can hardly be assumed that by the use of this sterotyped language it intended thereby to give its approval to the opinion of the trial judge, which is bodily embraced in the decree appealed from. The Constitution and laws of West Virginia neither require nor authorize an opinion of a *nisi prius* judge, and the unusual and irregular embodying thereof by such trial judge in his decree lent no sanctity thereto, and even if the decree had been affirmed in the first instance would not necessarily or at all have meant that it was affirmed because of the *reasons* assigned by the trial judge in a memorandum which he saw fit to embody in a decree. The decree, not the reasons, of a Circuit Judge, is what the appellate Court affirmed or reversed.

It is a question of gravest doubt whether the State Court had the *power*, even if it had the inclination, to reconsider or change its former decision, so far as not automatically changed or required to be changed by the decision of this Court. Its former order was final as to it. The term had ended. Virginia and West Virginia decisions are in accord with the decisions of this Court in holding that, "No principal is better settled, or of more universal application, than that no court can reverse or annul its own final decree, for error of fact or law, after the term in which they have been rendered unless for clerical mistakes." *Magwire* v. *Tyler*, 17 Wall. 253; 21 L. Edition 576.

It is hardly to be presumed that it would do so and yet entirely withhold any reason for so doing.

But if there should be any doubt upon the face of the record alone as to whether the Supreme Court of Appeals of West Virginia was itself deciding the case anew and adjudging new and different principles from those formerly decided by it in the same case, or whether it was simply attempting to execute the mandate of this Court we submit that all doubt upon this point is removed when such action is considered in the light of the duty of the State Supreme Court in the decision of causes under the State's Constitution.

Article VIII, Clause 5, of the Constitution of West Virginia, in effect since 1872, provides as follows:

> "When a judgment or decree is reversed or affirmed by the Supreme Court of Appeals, every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case; and it shall be the duty of the Court to prepare a syllabus of the points adjudicated in each case concurred in by three of the Judges thereof which shall be prefixed to the published report of the case."

This provision is perfectly plain. It requires the Supreme Court of Appeals when it exercises its own judicial judgments to decide every point fairly arising upon the record and to state concisely the reasons therefor in writing and to preserve such reasons with the record of the case, and further, under the specific and wise provision above quoted, that it shall be the duty of the Court to prepare a syllabus of the points adjudicated in each case concurred in by three of the Judges thereof, which shall be prefixed to th published report of the case.

Of course, it will be conceded that this Constitutional provision does not require the State Supreme Court to write an opinion or prepare a syllabus setting forth the reasons assigned and the questions arising and decided by the Supreme Court of the United States on writ of error to it. If therefore the

State Court by its final order was, as we understand, simply endeavoring to carry out and execute the mandate of this Court, no reasons, opinions or syllabus would be either proper or necessary.

If, however, the State Court intended, as counsed for the defendants in error are driven to suggest or assume that it did intend, to hold and decide as a matter of independent judgment that the entire statute was void, simply because this Court had held that a portion of the particular business done by a particular company during one year only was not subject to the tax which the State Court had thought it to be subjected to, then clearly a typical case would have been presented under the Constitutional provision requiring the Supreme Court of Appeals of West Virginia to state each point it was deciding, assigning its reasons in writing therefor, and prepare the syllabus in compliance with such provision.

This provision has been held in certain cases to be directory, and not to require the State Court to restate over and over again established principles of former decisions, constituting well settled law and filling the reports with useless matter. *Horner* v. *Amick*, 64 W. Va. 172. But it is applicable to all other cases before that Court, and is applied as to all points involving novel questions of law not already settled by its decisions. *Idem*, at page 175.

The purpose of such provision is obvious, namely, that the law of the State shall be definite, published, accessible and known to its citizens. When we consider the fact that in the case at bar the former decision of the State Court, and each point decided, has been so published in its official reports in compliance with the Constitution, we submit that it is almost unthinkable that if the same Court, in the same case and between the same parties, as a matter of its own independent judicial action undertook to reconsider practically every point decided by it theretofore, and to decide the same in a diame-

trically opposite way, it would have disregarded the Constitutional provision, and carefully and forever concealed from ascertainment the points which it was actually deciding, as well as the reasons therefor.

Counsel for the defendant in error are obliged to take the position that this was precisely what the Supreme Court of Appeals of West Virginia did, and they suggest, in the absence of any reason assigned by that Court for its action, that the Court upon learning that this Court had excluded from the operation of the statute a certain part of the business done by one company, during one year, assumed as matter of law that the Legislature would not have enacted such statute had it known that such excluded business would be held by this Court to be not subject to the tax, and accordingly that the particular company would pay for carrying on business during 1919 somewhat less than it would have done otherwise.

We submit that such assumption is both violent and unsupported in reason. The Court had judicial knowledge of the needs of West Virginia to raise additional revenues, and that a number of new methods of taxation were resorted to for such purpose, among them the act in question. It knew, and expressly held in its former decision, that the Legislature was aware that it could not impose a tax upon interstate commerce, or a tax measured by interstate commerce, and that it attempted to do no such thing. It specifically held that it was the legislative intent to tax only the business of carrying on local commerce, measured by such commerce, and assigned elaborate and unanswerable reasons for so holding. Exactly such a statute, in accordance with such legislative intent, it declared was enacted and upheld. We submit that the validity of such statute was conceded before this Court, and that its opinion, properly construed, sustained and upheld it. The argument, therefore, is not that a portion of the statute has been declared invalid, and that, therefore, perhaps the State Court might have assumed

that the Legislature would not have enacted the residue had it known of the invalidity of a part, but goes much further and assumes that the State Court assumed that the Legislature would not have enacted a perfectly valid statute if it had known that during one year one company would have paid less under the decision of this Court than it would under the decision of the State Court.

With great respect, we submit that such an assumption is utterly untenable, and that this Court will not assume that the State Court would have adopted any such line of reasoning or reached any such conclusion. There is no ground for such belief, except the present suggestion of counsel, and the further suggestion that this untenable argument, which counsel have never advanced in this case in any court, may perhaps have now suggested itself to the Supreme Court of Appeals of West Virginia and carried conviction which resulted in the final action of that Court.

The record, and the original brief of the Eureka Pipe Line Company, show that it conceded that 1,239,099.55 barrels of oil produced and used in West Virginia, during the year ended June 30, 1919, were transported in intrastate commerce, and that the tax may be levied and collected in respect of said 1,239,099.55 barrels of oil. The tax is two cents per barrel, which amounts to and involves $24,781.99 for said period, which amount the plaintiffs in error are restrained from levying and collecting by said final order of the Supreme Court of Appeals of West Virginia.

We respectfully submit that the effect of the judgment and decree of this honorable Court was to affirm so much of the decree of the Supreme Court of Appeals of West Virginia as permitted and authorized plaintiffs in error, as the agents and representatives of the State of West Virginia, to levy and collect the tax on said 1,239,099.55 *barrels of oil, or a total sum of* $24,781.99 *for the period in question;* and that the Supreme

Court of Appeals of West Virginia had no right to vary said judgment and decree upon any matter admitted, or decided upon writ of error; or to intermeddle with said judgment and decree, further than to settle so much as was remanded, and cannot question matters as to which it had not been reversed, and were bound to proceed and dispose of the case in conformity with the opinion of this Court.

We submit that the following cases support our contention in this respect.

In *Sibbald v. United States*, 12 Pet, 488, 9 L. Edition 1167, this Court held:

> "The inferior court is bound by the decree, as the law of the case; and must carry it into execution according to the mandate; *they can examine it for no other purpose than execution, or give any other or further relief; or review it upon any matter decided on appeal, for error apparent; or intermeddle with it further than to settle so much as has been remanded.*" (Italics ours.)

In *Gaines v. Caldwell*, 148 U. S. 288, 37 L. Edition, 432, this Court held that *where the lower court is reversed in part only and the cause remanded for further proceedings in regard to specified facts, the lower court is confined to such facts, and cannot question matters as to which it had been reversed, and where the merits of the case have been acted upon in the appellate court the lower court cannot reconsider them.*

In the opinion in *Gaines* v. *Caldwell, supra,* the court, at pages 239, 240, said:

> "Obeying the mandate of this court and proceeding in conformity with its opinion, in the present case, were not matters within the discretion of the circuit court; and, therefore, the cases which hold that this court will not direct in what manner the discretion of an inferior tribunal shall be exercised do not apply to the present case. *The opinion of this court proceeded distinctly upon an approval by it of the action of the circuit court*

in respect to the title and the possession and a disapproval only of the method of accounting.

"It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the circuit court; that the circuit court had a right, therefore, to proceed in the case in the language of the mandate, not merely 'in conformity with the opinion and decree of this court,' but also 'according to right and justice;' and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;' *in other words, that the whole controversy was to be reopened as if it had never been passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court.*" (Italics ours.)

In *West* v. *Brashear*, 14 Pet. 51, 54, 10 L. Edition 350, 351, the court said:

"There has been some discussion at the bar as to the principles by which a circuit court of the United States is to be governed when executing a mandate from the Supreme Court. Undoubtedly, the mandate must be its guide. *It is the judgment of this court transmitted to the circuit court.* And when the direction contained in the mandate is precise and unambiguous, *it is the duty of the circuit court to carry it into execution, and not look elsewhere for authority to change its meaning.*" (Italics ours.)

In delivering the opinion of the court, *Magwire* v. *Tyler*, 17 Wall. 253, 21 L. Edition 576, Mr. *Justice* Clifford said:

"By the directions of the mandate they were as much bound to proceed and dispose of the case *in conformity to the opinion of this court* as to reverse their former decree. But instead of that *they entered a new decree dismissing the petition, which in effect evades the di-*

rections given by this court and practically reverses the judgment and decree which the mandate directed them to execute. Argument, to show that a subordinate court is bound to proceed in such an event and dispose of the case as directed *and that they must have no power either to evade or reverse the judgment of this court, is unnecessary, as any other rule would operate as a repeal to the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect.*" (Italics ours.)

Mr. *Justice* Clifford further said:

> "*And it is clear that it is not competent even for this court, after the term expired, to review and reverse such decree.*" (Italics ours.)

Mr. *Justice* Clifford further said:

> "On receipt of a mandate it is the duty of the subordinate court to carry it into execution even though the jurisdiction do not appear in the pleadings." (Citing numerous cases.)

Mr. *Justice* Clifford further stated:

> "Judging from the proceedings of the State Court under the former mandate and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate. Such being the face, the duty of this court is plain and not without an established precedent. • • •
>
> Suffice it to say the rule is there settled, that where the cause has once before been remanded and the State court declines or refuses to carry into effect the mandate of the Supreme Court, the court will proceed to a final decision of the same and award execution to the prevailing party."

In *Durant* v. *Starrow*, 101 U. S. 555, 25 L. Edition 961, it was held:

> "On a mandate from this court affirming a decree, the circuit court can only record our order *and proceed with the execution of its own decree as affirmed.* It has no power to rescind or modify what we have established. Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. *The result of the appeal to us was an affirmance of what has been done below. After the appeal was taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down...* We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The circuit court had no power after that to do what we might have done and did not do." (Italics ours.)

In *Holleran* v. *Meisel*, 91 Va. 143, 148, 21 S. E. 659, the cases are collected and cited to show the following proposition of law:

> "When this court has construed the legal character and effect of certified copies of entries in certain public records, which involves the construction of the records themselves, *such construction is res adjudicata in this court and all the courts of this State.*"

In delivering the opinion in this case, Reily, *J.*, said:

> "When such decision was made and certified to the circuit court, *the legal character and effect of said entry or memorandum was henceforth res adjudicata and not further open for question or reconsideration by the circuit court, or even by this court.* We think that the construction thus placed on it was correct; but whether correct or not *it is to that extent the law of this case. It was the mandate of this court to the lower court*, and the paper or entry was henceforth not to be treated as a grant or patent. This is well settled by the decisions of this court, and of other courts of highest authority." (Citing a large number of cases, including *Tyler* v. *Magwire*, *supra*, and *West* v. *Brashear*, *supra*.)

"Where a decree after an accounting was 'reversed and the case remanded with instructions to strike out allowances for rental', before a certain date, and to allow subsequent rentals, it was held: *That this in effect affirmed so much of the decree as allowed these second rentals; that the court below had no power to reopen the inquiry into the accounts.*" *Kneeland* v. *Am. Loan & T. R. Co.*, 136 U. S. 89, 34 L. edition 379, 385.

In *Chaires* v. *United States*, 3 How. 611, 11 L. Edition 749, it was held:

"Where this court has affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, *it would not be proper for the court below to open the case for a rehearing*, for the purpose of adopting another survey.

"*The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done.*"

In delivering the opinion in this case, Mr. *Justice* Catron said:

"But the duties of the court did not end here; by the 2d section of the Act of 1824 it was not only given full power and authority *to hear and determine all questions arising in the cause relative to the validity of the title* • • •.

For this purpose the petition for a rehearing was filed, seeking to have the decree of 1830 reformed, and that part of it establishing locality and boundaries set aside or disregarded, and the land located elsewhere. *This the Circuit Court of East Florida had no power to do*, on the facts set forth by the petition, *because the decree of this court, made in affirmance of that made below, is conclusive on the inferior court; and it has no authority to disturb it by the mode proposed*, but *can only execute our mandate, and settle so much as remains to be done.*"

The Court will remember that this tax applied not only to this character of the business done by the Eureka Pipe Line Com-

pany, but also to every other company in West Virginia transporting oil and gas by pipe lines over a certain length. It is apparent, therefore, that, if we are correct as to the intentions of this Court to treat the statute as valid so far as the local commerce of such companies is concerned, the statute was an effective and large producer of the revenue sorely needed by the State. No company covered by the statute escapes the taxation which it provides by reason of the decision of this Court, and none of the business of any such transportation company which the State had or has the power to tax escapes taxation to the full extent of such power by reason of such decision.

The most that can be said is that the Supreme Court of Appeals of West Virginia was of opinion that during one particular year one company was not subject to a tax on a certain part of its business which that Court had held to be local and not interstate. This certainly could not affect the validity of the statute, and equally certain it could not and did not affect the legislative intent in the enactment of such statute. If the Legislature is to be credited with the knowledge imputed to it by the Supreme Court, that interstate commerce could not be taxed or taken as a measure of taxation, then it would seem that it might be imputed, in law, with knowledge that the business which this Court has held to be interstate was interstate, and to have enacted the statute in the light of such knowledge.

Finally, we submit that the reason now suggested by counsel as being that which might have influenced the State Supreme Court in its final action, namely, that because the statute for one year and as to one company applied to less business than the State Supreme Court thought was covered by the statute, could hardly have controlled its judgment or caused it to reach a conclusion exactly opposed to its former conclusion, because that Court, and this Court, had before it no record justifying it in the assumption that the business held by this Court to be untaxable in any way influenced the Legislature. That Court

could not know what was the character, or the extent of the tax business done by the other numerous corporations of West Virginia subject to this tax. It had no method of knowing that the business necessities of this plaintiff, the Eureka Pipe Line Company, in the ensuing year might not become wholly local, with no element of interstate commerce anywhere involved. All it knew or could know was that such business would change and fluctuate. It knew that conditions may well develop resulting in the greater part of all oil produced and transported by the Eureka Pipe Line Company in West Virginia being consumed in West Virginia, and thus becoming subject to tax.

Therefore, aside from any question of the amount of the immediate revenue derivable under the act in question, it may certainly be assumed that it was enacted by the Legislature with knowledge and reasonable anticipation of the revenues thereunder steadily increasing in future years.

It is a conservative statement that the statute in question, as construed by the State Court and by this Court, reaches with the power of taxation every person, firm and corporation engaged in this class of business which the State had the power to tax, and reaches every barrel of oil subject to taxation or which can be taken as a measurement of taxation.

It must also be borne in mind that the Legislature knew, indeed was keenly aware, that oil as a subject of taxation is elusive and will become exhausted, and that to derive any considerable revenue therefrom it must be taxed as used and before exhaustion.

This being true, we confess that the argument of counsel that the statute has failed to accomplish a large part of the legislative intent and that it will be presumed that the Legislature would not have so enacted it if it had known that interstate commerce

was not subject to taxation, or that a part of the business of this company which one court thought was intrastate business is in law interstate business, is difficult to follow. It is still more difficult to believe that this line of argument which escaped all counsel throughout and the State Court on the first hearing, as well as this Court, suggested itself to the State Court upon remand of the cause thereto with such compelling force as to require it to sweep aside its own adjudication and its own reasons therefor, and, in effect, all that was done before and by this Court on the first writ of error.

It is still more difficult to believe that a reason so cogent, and so destructive in its application, should have been scrupulously concealed by the State Court and left to mere conjecture, particularly in the face of the Constitutional provision above quoted.

CONCLUSION.

We submit that the motion to dismiss or affirm should be overruled. And the case having been fully presented on brief, unless the Court desires further argument on the merits, the final order of the Supreme Court of Appeals of West Virginia pronounced on the 2d day of June, 1922, should now be reversed with costs and the cause remanded with directions to the Court below to reverse the decree of the Circuit Court of Kanawha County of September 4, 1920, in so far as the same restrains the defendants from enforcing or attempting to enforce against the plaintiff the provisions of said act in so far as the same applies to and is measured by the intrastate business of said plaintiff, including in said intrastate business such oil as is produced, transported and sold by it to persons and corporations for use and actually used and consumed in West Virginia, and excluding from intrastate business all oil transported by it to points outside of West Virginia or transported and sold in West Virginia

to persons and corporations for transportation and use outside of West Virginia and actually so transported and used.

Respectfully submitted,

WALTER S. HALLANAN,
State Tax Commissioner of West Virginia, and
E. T. ENGLAND,
Attorney General of West Virginia.

S. B. AVIS,
FRED O. BLUE,
WM. GORDON MATHEWS,
Attorneys for Plaintiffs in Error and Petitioners for certiorari.

Office Supreme Court, U. S.
FILED
FEB 17 1923
WM. R. STANSBURY

IN THE

Supreme Court of the United States

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia, and E. T. ENGLAND, Attorney General of the State of West Virginia,
Plaintiffs-in-Error and Petitioners,

AGAINST

THE EUREKA PIPE LINE COMPANY, a corporation,
Defendant-in-Error and Respondent.

October Term, 1922,
No. ~~569~~. 885.
— No. 885
On Writ of Error and Motion for Writ of Certiorari. No. 569.
—
Motion to dismiss or affirm or to place on Summary Docket.

SIR:

PLEASE TAKE NOTICE that at a session of this Court to be held at the Capitol in Washington, D. C., on the 12th day of March, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, we shall move the motion annexed for an order dismissing the writ of error heretofore issued herein, dated August 28, 1922, and directed to the Supreme Court of Appeals of the State of West Virginia, and denying the petition for a writ of certiorari made herein

Statement of the Case.

I.

On the petition of the plaintiffs-in-error, a writ of error to the Supreme Court of Appeals of the State of West Virginia, to review the final decree of that court, made in this cause June 2, 1922, was on the 28th day August, 1922, allowed by former Justice Day. On October 2nd, 1922, plaintiffs-in-error also applied for a writ of certiorari to review the same decree, the decision on which motion was ordered to be deferred until the hearing on the writ of error.

The decree, review of which is sought, adjudged in effect that a State statute was invalid in its entirety, because it had, by the former decision of this Court, been adjudged in part repugnant to the United States Constitution. The decree was made by the Court below upon receipt of the mandate of this Court, following the decision and order rendered and made here in the same case December 12, 1921. (Record on petition for certiorari.) Plaintiffs-in-error ask for a reversal on the ground that the Court below, as they claim, failed to dispose of the case in conformity with the said mandate and with the opinion of this Court.

II.

This is a suit in equity, in which the bill of complaint filed in the Circuit Court of Kanawha County, West Virginia, prayed for an injunction restraining the plaintiffs-in-error (defendants below) from enforcing against defendant-in-error (plaintiff below) a certain statute of the State of West Virginia, being Chapter 5 (House Bill No. 3) of the Acts of the Legislature of

West Virginia, Extraordinary Session of 1919, commonly known as the Transportation Tax Act, and that the Act be adjudged unconstitutional and void as to defendant-in-error (plaintiff below), on the ground that it was repugnant to the Constitution of the United States, and particularly to Section 8 of Article 1, thereof. (Record on first hearing, pages 2-22.) The decree of the Circuit Court adjudged in substance that the Act was unconstitutional as to interstate commerce, *and that, not being severable, it was therefore wholly null and void.* (Record on first hearing, page 694.) The plaintiffs-in-error (defendants below) appealed to the Supreme Court of Appeals of the State of West Virginia, and that Court held that the Legislature must be presumed to have intended to confine the Act in question to intrastate commerce *as defined in the opinion of the Supreme Court of Appeals*, and thereupon reversed the decree of the Circuit Court in so far as the same applied to any oil originating in the State of West Virginia, all of which oil said Supreme Court of Appeals held to have moved in intrastate commerce, and as to all of which oil that Court then sustained the Act and entered a final decree accordingly. (Record on first hearing, page 702.)

Thereafter, upon the petition of this defendant-in-error (plaintiff below) a writ of error was allowed by the late Chief Justice White, and a hearing had thereon in this Court, (*The Eureka Pipe Line Co.* v. *Hallanan*, No. 255, October Term, 1921) and this Court delivered its decision on December 12, 1921, reversing the decree of the Supreme Court of Appeals and ordering that the cause be remanded to that Court for further proceedings not inconsistent with the opinion of this Court.

Upon the receipt of the mandate, the Supreme Court of Appeals, on June 2nd, 1922, entered a decree in the following terms (italics ours):

"Upon an appeal from a decree of the Circuit Court of Kanawha County, pronounced on the 8th day of September, 1920.

The Court having maturely considered the mandate of the Supreme Court of the United States, filed and entered of record in this cause, and the *record of the decree aforesaid* (referring to the decree of the said Circuit Court) is of opinion that there is no error in said decree. It is therefore adjudged, ordered and decreed that the *decree of the Circuit Court of Kanawha County* pronounced in this cause on the 8th day of September, 1920, *be* and the same hereby is *affirmed* and that the appellants do pay to the appellee thirty dollars ($30) damages and its costs about its defense in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County." (Record on petition for certiorari.)

No opinion was handed down by the Supreme Court of Appeals upon the entry of this decree.

Thereupon this writ of error was taken and this petition for a writ of certiorari filed by the plaintiffs-in-error.

This motion is filed to dismiss the writ of error and to deny the petition for a writ of certiorari or to affirm the judgment of the said highest Court of West Virginia *or* in the alternative to advance the cause for early argument on the Summary Docket.

Argument.

The plaintiffs-in-error cannot prevail herein for the reasons:

(1): The writ of error should be dismissed because the decree complained of adjudged in effect that the State statute was *invalid* in its entirety, for the reason

that the Legislature would not have enacted it, if invalid as to interstate commerce as defined by this Court. As this involved the construction of a state statute, its interpretation, when not inconsistent with the Constitution of the United States, is final on this Court. In any event, under the Judicial Code, Sec. 237, it is only when a state statute has been held *valid* by the highest Court of the State that a writ of error will lie.

(2): The motion for a writ of certiorari should, for like reasons, be denied.

(3): The decree complained of should be affirmed, because, for the reasons hereinafter given, the question upon which the decision of the case depends is frivolous.

If, however, the Court desire further argument, then it is respectfully submitted that the cause either should be ordered transferred for hearing to the Summary Docket, because it is of such character as not to justify extended argument, or should be advanced for early argument on the General Docket as a case once adjudicated by this Court upon the merits.

POINT I.

This Court confined its decision to the status of oil produced in and transported out of the State of West Virginia, and the status of the oil produced and delivered within the state was left open.

1. This is clear from the prevailing opinion of Mr. Justice Holmes, who says (italics ours):

> "It is admitted that the tax may be levied in respect of the last item (referring to oil delivered within the State), but the question before us is whether the tax can be laid upon the *whole product of the State* upon which was imposed the gathering charge."

And again (italics ours):

> "What it (the court below) has done is to decide that the statute covers *all the oil* produced in West Virginia and that it shall be upheld in so doing."

And the dissenting opinion of Mr. Justice Clarke says:

> "There is no controversy as to the oil from other States, or as to the State-produced oil that was delivered to refineries in the State."

The suggestion that the tax might be levied on the oil delivered within the State did not take into account the question of the severability of the Act, as that question was not before this Court on the previous appeal and would naturally be decided by the Court below after the receipt of the mandate from this Court, as the validity of that portion of the statute which referred to *intrastate* transportation was not a federal question and was within the competency of the State Courts.

2. After the appeal to this Court and the sending down of its mandate, the Court below may consider and decide any questions left open by the mandate, or not considered in this Court.

> *Re Sanford Fork & Tool Co.*, 160 U. S. 247, 255-6.
>
> *Ex parte The Union Steamboat Co.*, 178 U. S. 317, 319.
>
> *Mutual Life Ins. Co.* v. *Hill*, 193 U. S. 551, 553, 554.
>
> *Schneider Granite Co.* v. *Gast Realty, etc., Co.*, 245 U. S. 288, 290.
>
> *Wells, Fargo & Co.* v. *Taylor*, 254 U. S. 175, 181, 182.

In *Mutual Life Insurance Co.* v. *Hill, supra,* Mr. Justice Brewer said, at page 553:

> "When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. * * * Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided."

In *Schneider Granite Co.* v. *Gast Realty Co., supra,* where, on a former hearing, this Court had held that a tax based upon area was unconstitutional, but made no decision as to the tax based upon frontage, and the Supreme Court of Missouri, on the coming down of the mandate, reversed the judgment of the trial court and remanded the cause with directions to enter judgment for the amount of the frontage assessment only, Mr. Justice Pitney said, at page 290:

> "The mandate, while reversing the judgment that was under review on the former writ of error, permitted further proceedings of any kind to be had in the state courts, provided they were not inconsistent with the opinion of this court. It left the tribunals of the State at liberty to exercise their proper jurisdiction in the cause between the parties, so long as they avoided a conflict with the rights of the landowners under the Fourteenth Amendment as established by our decision. As our former opinion shows, the conflict with federal rights was due solely to the mode in which that portion of the tax which was levied according to area was distributed. The subsequent judgment of the State court sustaining the tax to the extent of the frontage assessment was not inconsistent with it."

In *Gaines* v. *Rugg*, 148 U. S. 228, discussed in brief of plaintiff-in-error, this Court, on the first hearing, had sustained the Circuit Court on a question of title, but reversed it as to the scope of an accounting. After receiving the mandate, the Circuit Court allowed the case to be reopened for further proofs as to title. This, of course, violated the mandate and could not be sustained.

Other cases cited on brief of plaintiff-in-error under the same head show that what the lower court undertook to do after receiving the mandate of this Court was, in each instance, to pass anew upon some point definitely settled here.

Tyler v. *Magwire*, 17 Wall. 253.
Chaires, Ex'r. v. *United States*, 3 Howard, 611.

Certain cases cited by plaintiff-in-error simply affirm the undisputed rule that whatever was before this Court and is disposed of, is considered as finally settled.,

Durant v. *Essex Co.*, 101 U. S. 555.
Ex parte Sibbald v. *United States*, 12 Pet. 488.
West v. *Brashear*, 14 Peters 51.

3. In the case at bar the severability of the statute *as regards intrastate transportation* was not before this Court on the former appeal. All it decided was that oil produced in West Virginia and transported out of the state was so transported in interstate commerce and that the statute as applied to *interstate transportation as thus defined* was invalid. It was then for the courts of West Virginia to determine whether the remaining portion of the statute, which in itself did not offend the federal Constitution, was valid. This they have done and this Court—no federal question being presented—will not review a decision of the State Court which was within its exclusive competency.

In general, the question of the severability of a State statute is one for the highest court of the State to decide.

> *Schneider Granite Co.* v. *Gast Realty Co.*, 245 U. S. 288, 290.
> *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298, 302.
> *Berea College* v. *Kentucky*, 211 U. S. 45.
> *People* v. *Knapp*, 230 N. Y. (Ct. of Appeals), 48, decided November, 1920.

In *Schneider Granite Co.* v. *Gast Realty Co., supra,* after the mandate from this Court went down, the Supreme Court of Missouri held that the tax was severable and entered a decree accordingly. Its action in so doing was approved in this Court, upon the second appeal, Mr. Justice Pitney saying (245 U. S. 290) (italics ours):

> "The landowners insist that the two elements were inseparable, and that the tax, being void in part, was entirely void. But the Supreme Court of the State held in this case, following *Collier Estate* v. *Western Paving & Supply Co.*, 180 Missouri 362, 375, that the tax was severable. *This, like the kindred question of the severability of a statute of the State, is a question of state law.* See *Guinn* v. *United States*, 238 U. S., 347, 366; *Myers* v. *Anderson*, 238 U. S. 368, 380."

In that case, to be sure, the lower court held the tax to be severable; but it could with equal right have held that it was not severable. The right to affirm implies the right to deny.

In *People* v. *Knapp, supra,* which was decided November, 1920, Judge Cardozo, at page 60, referring to the decision of this court in *Meyer* v. *Wells, Fargo & Co., supra,* says:

> "Even there it was recognized that the propriety of severance was a subject upon which the state court would speak with final authority, since in last analysis it was a question of the legislative purpose. * * * The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether."

POINT II.

The presumption is that the Supreme Court of Appeals of West Virginia, in making the decree now complained of, did so on the ground that the Legislature would not have passed the Act if confined solely to oil originating and delivered within the state, and that, therefore, the act was not severable along such lines; and hence, in view of the decision of this Court, that the entire act must be held unconstitutional.

1. It is well-settled that, in the absence of proof to the contrary, an appellate court will presume that the inferior court has acted in accordance with the law and has based its decision upon grounds which were open to it to take and which, if taken, would sustain its judgment.

> *Reinman* v. *Little Rock*, 237 U. S. 171, 180.
> *The S. B. Wheeler*, 20 Wallace, 385, 386.
> *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 25.
> *Bankers' Trust Co.* v. *Missouri, K. & T. Ry. Co.*, 251 Fed. 789, 797, C. C. A., 8th Cir. (1918), Opinion by Sanborn, *C. J.*

In *Reinman* v. *Little Rock, supra,* Mr. Justice Pitney said, at page 180:

> "If the record, including the opinion, leaves it a matter of doubtful inference upon what basis of fact the state court rested its decision of the Federal question, it seems to us very plain, upon general principles, that we ought to assume, so far as the state of the record permits, that it adopted such a basis of fact as would most clearly sustain its judgment."

In *The S. B. Wheeler, supra,* Mr. Justice Waite said (p. 386) (italics ours):

> "There is no dispute as to the law. Two courts have already found against the appellants. It has been over and over again ruled by this court that under such circumstances the burden is on the appellant to show the error. *Every presumption is in favor of the decrees below.* We ought not to reverse unless the error is clear. Such is not the case here."

2. The Supreme Court of Appeals handed down no opinion upon entering the decree in controversy, but the presumption that in making its decision it did so upon the ground that the Act was not severable is strongly supported by the language of the decree, which says in part (italics ours):

> "The Court having maturely considered the mandate of the Supreme Court of the United States, filed and entered of record in this cause, and *the record of the decree aforesaid* (referring to the decree of the Circuit Court) is of opinion that there is no error in said decree."

And it then proceeds to affirm the decree of the Circuit Court. But that decree was based solely upon the

ground that the Act was not severable as between interstate and intrastate commerce, and that, being void as to interstate commerce, the entire Act fell.

If it be urged that this position is inconsistent with the position taken by the Supreme Court of Appeals of West Virginia in its original decision, the answer is that the Act, as then construed by the Supreme Court of Appeals, was held to apply to all the oil produced in West Virginia. Any question of severability at that point would have been a question whether the legislature would have been willing to pass an Act applicable to all the oil produced in the State, even though it could not reach oil originating in other States. But after the decision of this Court had excluded from the burden of the tax the larger portion, nearly five-sixths, of all the oil produced in the State, then the question presented to the Supreme Court of Appeals was whether the legislature would have been willing to retain the tax on so small a portion of the oil as that which originated in and was delivered within the State. Thus, a new question in respect to severability was presented for the first time to the Supreme Court of Appeals.

3. The presumption that the Court below based its decision upon the non-severability of the Act is further strengthened by the fact that the amount of oil to which alone, if to any, (in view of the decision of this Court), the Act remained applicable was less than six per cent. of the total amount of oil transported by The Eureka Pipe Line Company (1,239,099 barrels out of 22,000,000 barrels) in the year in question.

Pollock v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 636-7.

Comanche Light & Power Co. v. *Nix*, 53 Okla. 220 (1916).

In the latter case, the Supreme Court of Oklahoma was considering the Act which had theretofore been held by this Court, in *Meyers* v. *Wells, Fargo,* 223 U. S. 298, to be invalid as to interstate commerce. In the *Comanche* case it was claimed by the Attorney General of that State that the Act was severable and that, so far as it affected corporations operating wholly within the State, it should be sustained. Quoting from *Pollock* v. *Farmers Loan & Trust Co.*, at page 636 of that case, the Oklahoma Court said (p. 228):

> "What was there said applies with equal force here. To say that the Legislature intended, notwithstanding the plain language of the statute, that in any event those corporations doing business wholly within the state should pay the tax, while the great majority of the transportation and transmission and other companies doing an interstate business should be relieved of its onerous provisions, would be to impute to the Legislature a purpose violative of the spirit, if not the letter, of the organic law, requiring that taxes shall be uniform upon the same class of subjects. The statute provided a comprehensive scheme or system of taxation, binding alike on all within its terms. As it remains, the result aimed at cannot be accomplished, for there can be no room for doubt that the destruction of the part of the statute stricken down would produce results neither contemplated nor desired by the Legislature. When such is the case, the only thing that remains is to hold the remainder of the statute inoperative and void."

The Court then decided that the entire Act was invalid.

4. If the decision of the Supreme Court of Appeals was based upon the non-severability of the Act, then this Court had no jurisdiction to entertain a writ of

error or to grant a writ of certiorari, the question of severability being, as matter of statutory construction, primarily for the decision of the highest court of the State, and this Court, on well considered principles, will accept such interpretation as final.

Schneider Granite Co. v. *Gast Realty Co.*, 245 U. S. 288, 290.
Meyer v. *Wells, Fargo & Co.*, 223 U. S. 298, 302.

POINT III.

The writ of error should be dismissed, the petition for a writ of certiorari should be denied, or the decree of the Court below should be affirmed. If, however, the Court desire further argument before taking such action, then it is submitted that the case should either be placed upon the Summary Docket and its hearing expedited on the ground that the case is of such a character as not to justify extended argument or should be advanced upon the General Docket for early argument as a case once adjudicated by this Court upon the merits.

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